STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	Civil Action No. 2019-CP-4005486
	)	
ROBERT DURDEN INGLIS; FRANK HEINDEL,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
THE SOUTH CAROLINA REPUBLICAN PARTY & DREW MCKISSICK, State Chairman of the South Carolina Republican Party, in his official capacity.	)	
	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 2

STANDARD OF REVIEW 4

ARGUMENT 5

I. Plaintiffs have standing 5

A. Plaintiffs have constitutional standing 5

B. Plaintiffs have public interest standing 9

II. This case is justiciable and does not present a political question 11

III. Plaintiffs are entitled to sue under the Declaratory Judgments Act 14

IV. Defendants violated sections 7–11–10, 7–11–20, and 7–11–30 of the Election Law 17

A. Sections 7–11–10 and 7–11–30 apply to presidential preference primaries 19

B. Defendants' conduct violates either 7–11–20(B)(2) or 7–11–20(A). 23

V. Defendants violated the Due Process Clause of the South Carolina Constitution. 27

VI. Neither the statutes at issue nor the relief requested violate the First Amendment 30

VII. The remaining equitable factors support granting a preliminary injunction 35

A. Plaintiffs have established irreparable harm 36

B. No bond should be required 37

CONCLUSION 39

INTRODUCTION

Plaintiffs here are South Carolina Republican voters who intended to vote in the 2020 Republican primary and still wish to do so. This case is about the unlawful decision of the State Executive Committee of the South Carolina Republican Party to cancel its "First in the South" presidential primary.

South Carolina's election laws create democratic safeguards to ensure that elections—including primaries—are fair. The law requires that a political party select its preferred candidate through *either* a primary election *or* a state party convention. S.C. Code Ann. § 7–11–10. A party cannot choose a lawless third option of simply allowing a small cabal of party bosses to select their preferred candidate, without any input from the party's voters. *See id.* To further guarantee that *voters*, and not party bosses, have a say, the law also requires a supermajority of party voters to twice approve any switch from using a primary to using a state convention to select candidates. *Id.* § 7–11–30. Moreover, the law requires a party to follow its own internal rules. *Id.* § 7–11–20. And the South Carolina Republican Party's rules, in turn, require the party to hold a presidential primary unless the voters at a state convention decide otherwise.

Defendants have violated *all* of these requirements. Instead, the State Executive Committee has chosen which candidate to support by fiat, and in doing so, excluded Republican voters from the process entirely—in violation of the law and its own rules.

All of defendants' arguments in its motion to dismiss are incorrect. Plaintiffs have standing because they have plead a concrete injury-in-fact that is traceable to defendants' conduct and can be redressed by a remedy from this Court. And despite defendants' protestations, plaintiffs have not raised a political question. Quite to the contrary, plaintiffs have raised a simple question of statutory interpretation of South Carolina's Election Laws, the likes of which South Carolina courts routinely address. This Court should deny defendants' motion to dismiss.

BACKGROUND

On September 7, 2019, the Executive Committee of the South Carolina Republican Party ("S.C. GOP") voted to cancel the S.C. GOP's 2020 presidential primary. Compl. ¶ 47. Rob Godfrey, who served as a top advisor to former South Carolina Governor Nikki Haley, called the cancellation "a shady backroom deal where a small group of party insiders made a big decision that stops hundreds of thousands of voters from participating in the process." *Id.* ¶ 49.

Plaintiffs filed this lawsuit to enforce the democratic safeguards guaranteed by party rules, state law, and the South Carolina Constitution. Plaintiffs intended to vote in the 2020 Republican primary and still wish to do so.

Bob Inglis is a registered voter in Greenville County, South Carolina. Pls.' Mot. for Preliminary Injunction, Ex. 1, Aff. of Robert Durden Inglis ("Aff. of Mr. Inglis") ¶ 1; Compl. ¶ 12. He previously represented South Carolina as a Republican in the United States Congress from 1993-–1999 and from 2005–2011. Aff. of Mr. Inglis ¶ 2; Compl. ¶ 13. Mr. Inglis has voted regularly in South Carolina,

including in numerous Republican primaries, for over three decades. Aff. of Mr. Inglis ¶ 3; Compl. ¶ 14. He views primary elections as the place where he, as a member of the Republican Party, can shape how the party looks and feels; and he intended to vote in the 2020 South Carolina Republican presidential preference primary—a vote that he recognizes is "particularly influential" due to South Carolina's "First in the South" status. Aff. of Mr. Inglis ¶ 5; Compl. ¶ 15. As a result, the decision to cancel the primary harmed Mr. Inglis because it denied him his right to vote in the primary and his best chance to have a voice in his party's selection of a presidential candidate. Aff. of Mr. Inglis ¶ 6; Compl. ¶ 16.

Plaintiff Frank Heindel is a registered voter in Charleston County, South Carolina. Pls.' Mot for Preliminary Injunction, Ex. 2, Aff. of Frank Heindel ("Aff. of Mr. Heindel") ¶ 1; Compl. ¶ 17. Mr. Heindel regularly votes, including in the South Carolina Republican primaries in 2000, 2002, 2004, 2008, and 2012, and he has donated to the South Carolina Republican Party. Aff. of Mr. Heindel ¶¶ 2–3; Compl. ¶¶ 18–19. Mr. Heindel intended to vote in the 2020 Republican presidential primary, and he still desires to do so because he believes that voting in a primary is part of having a healthy debate, a healthy party, and a healthy democracy. Aff. of Mr. Heindel ¶¶ 4–5; Compl. ¶¶ 20–21. Cancelling the primary harms Mr. Heindel because it denies him the right to vote and deprives him of the opportunity to express his political views and to participate in the democratic process. Aff. of Mr. Heindel ¶¶ 6–7; Compl. ¶¶ 20–21.

STANDARD OF REVIEW

Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure do not have identical standards of review. In particular, the rules differ as to whether this Court needs to accept the well-pleaded allegations of the complaint as true.

Under Rule 12(b)(1), this Court "examines whether the complaint fails to state facts upon which jurisdiction can be founded." *Rega v. Rega*, No. 19-259, 2019 WL 4466977, at *3 (D.S.C. Sept. 17, 2019) (interpreting Federal Rule 12(b)(1)). When resolving a Rule 12(b)(1) motion, the Court "may consider undisputed facts and any jurisdictional facts that it determines." *Id.* (same). As a result, the Court may review "affidavits and other evidence outside the pleadings . . . in support of a motion to dismiss based on lack of jurisdiction." *Baird v. Charleston Cty.*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999).

Under Rule 12(b)(6), by contrast, the complaint should be "construed liberally and the Court must presume all well plead facts to be true." *Charleston Cty. School Dist. v. Harrell*, 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011). So a Rule 12(b)(6) dismissal is improper "[i]f the facts alleged and inferences reasonably deductible from the allegations set forth in the complaint, viewed in the light most favorable to the plaintiff on any theory." *Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 497 (2014). "The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." *Id.*

ARGUMENT

I. Plaintiffs have standing.

A. Plaintiffs have constitutional standing

The right to vote is "the most basic of political rights," and interference with that right satisfies the injury-in-fact requirement of constitutional standing. *FEC v. Akins*, 524 U.S. 11, 25 (1998).[1] The U.S. Supreme Court has "long recognized that a person's right to vote is individual and personal in nature" and that "voters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that disadvantage." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018). Thus, "any person whose right to vote is impaired . . . has standing to sue." *Gray v. Sanders*, 372 U.S. 368, 375 (1963) (citing *Baker v. Carr*, 369 U.S. 186, 204–08 (1962); *Smith v. Allwright*, 321 U.S. 649 (1944)).

Plaintiff Inglis has established the concrete and particularized harm of being denied the opportunity to vote in the South Carolina primary for his presidential candidate of choice and to participate in shaping the Republican party, as he has done for the past three decades and still wishes to do. Compl. ¶¶ 14–16; Aff. of Mr. Inglis ¶ 6. Plaintiff Heindel has established the concrete and particularized harm of

[1] The South Carolina Supreme Court has adopted the U.S. Supreme Court's articulation of the "irreducible constitutional minimum of standing," which consists of three elements: (1) the plaintiff must have suffered an "injury in fact;" (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be "redressed by a favorable decision." *Sea Pines Ass'n for Prot. of Wildlife, Inc.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (internal citations omitted) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–61 (1992)).

being deprived of the ability to vote in the South Carolina Republican primary, as he has done since at least 2000, and to express his political views as a participant in the democratic process. Compl. ¶¶ 20–21; Aff. of Mr. Heindel ¶ 7.

That plaintiffs were deprived of the right to vote in a primary, rather than in a general election, changes nothing. The Supreme Court recognized decades ago that primary voters have standing to challenge unconstitutional incursions upon their voting rights. *Gray*, 372 U.S. at 374–75 (holding that voter had standing to challenge unequal primary vote-counting method). And "where the primary is by law made an integral part of the election machinery," a voter's right to participate in the primary is constitutionally protected "just as is the right to vote at the election." *United States v. Classic*, 313 U.S. 299, 318 (1941); *see also Gray*, 372 U.S. at 374–75. That's the case here: South Carolina law makes "the primary an integral part of the procedure of choice," and "the primary effectively controls the choice" of the party delegates. *Classic*, 313 U.S. at 318; *see* Pls.' Mem. of Law in Supp. of Pls.' Mot. for Preliminary Injunction ("Pls.' Mem."), Part I, pp. 6–20; *see also* Part IV, *infra*; Defs.' Mem. in Supp. of Mot. to Dismiss & Opp. to Pls.' Mot. for Prelim. Injunction ("Defs.' Mem.") at 5 (acknowledging that when a primary is held, "the state's delegates are officially bound to vote for the winner of the South Carolina presidential preference primary on the first ballot of nominations at the convention"). Defendants' assertion that "the plaintiffs have no legally protected

interest in voting in a political party's presidential preference primary" is just wrong. Defs.' Mem. at 10.[2]

Defendants are also wrong that "the plaintiffs' alleged interest is no different than that of the general public." Defs.' Mem. at 12. That other South Carolina voters who intended to cast a primary vote share plaintiffs' harm makes it no less an injury-in-fact. Although "the fact that an interest is abstract and the fact that it is widely shared go [often] hand in hand," "their association is not invariable." *Akins*, 524 U.S. at 24. "[W]here a harm is concrete, though widely shared, the [U.S. Supreme] Court has found 'injury in fact.'" *Id.* And being deprived of the right to vote is the quintessential concrete harm that is widely shared. *Id.* at 25 (impairing voting rights is "sufficiently concrete and specific such that the fact that it is widely shared does not deprive . . . [it of] its vindication in the federal courts"); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 223 n.13 (1974).

Nonetheless, defendants claim that plaintiffs' injury is not cognizable because they still have the ability to lobby party delegates to support plaintiffs' favored candidate. Defs.' Mem. at 20. But the Constitution tolerates no such cheapening of the right to vote, which is one of the fundamental personal rights included within the concept of liberty protected by the Due Process Clause. *See United States v. Texas*, 252 F. Supp. 234, 250 (W.D. Tex. 1966), *summarily aff'd*, 384 U.S. 155

[2] To the extent defendants are attempting to shoehorn their merits arguments here, those arguments have no bearing on plaintiffs' standing. *See Bell v. Hood*, 327 U.S. 678, 682 (1946) ("Jurisdiction . . . is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action[.]").

(1966); *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983). Defendants cannot illegally deprive plaintiffs of this fundamental right, replace it with a futile exercise, and then cry "no harm, no foul." If "lobbying" party officials were viewed as an adequate substitute for primaries and conventions, it's hard to see why the Legislature and the GOP itself would have bothered to institute laws and rules to protect those more formalized forms of political participation from arbitrary elimination.

Defendants appear to concede the causal connection between their actions and plaintiffs' injury. Defs.' Mem. at 13. Indeed, it cannot be disputed that up until September 7, 2019, plaintiffs had the right and intention to participate in the South Carolina Republican primary. On that day, however, the Executive Committee of the S.C. GOP unlawfully took that right away. Thus, plaintiffs were injured.

Yet defendants argue that plaintiffs' requested relief cannot redress their injury because they can't show that their preferred candidate would win the primary, and President Trump "would still win South Carolina in a landslide anyway." Defs.' Mem. at 13. Regardless of whom plaintiffs intend to vote for, that argument misses the point. Plaintiffs ask for nothing more than their right to vote back, not for a guarantee of any particular outcome. That is enough to establish standing, even if casting a primary vote "invariably, sometimes or never determines the ultimate choice" of the candidate. *Classic*, 313 U.S. at 318.

B. Plaintiffs have public interest standing

Even if the Court finds that plaintiffs lack constitutional standing, it should confer standing under the public-importance exception. Under that doctrine, "a court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance." *Baird*, 333 S.C. at 531, 511 S.E.2d at 75. In that circumstance, a plaintiff need not prove a concrete or particularized injury, *S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 118, 804 S.E.2d 854, 858–59 (2017), nor show that he has "an interest greater than other potential plaintiffs." *Davis v. Richland Cty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 742 (2007). A court determining whether to confer public importance standing should strike an appropriate balance between affording "access to the judicial process to address alleged injustices" and avoiding "numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits." *S.C. Pub. Interest Found.*, 421 S.C. at 118, 804 S.E.2d at 859 (internal quotation marks omitted). But the key consideration is whether resolution is needed for future guidance, as that is what makes an issue transcend a purely private matter and rise to the level of public importance. *Id.*

Few public functions are as likely to recur as the presidential primary. And given defendants' extreme position that the decision to hold or cancel the primary "rests solely with the Party," Defs.' Mem. at 23, this likely won't be the last time the Party exceeds the scope of its power or attempts to exclude Republican voters from the candidate-selection process. Moreover, since September 7, Republican voters

across the state have made it abundantly clear that participating in the selection of the next Republican candidate for President is a matter of monumental public importance.[3] So has the state Republican Party itself in the recent past. *See* Pls.' Mem. at 1 & n.1. This Court should grant public-importance standing to ensure that all South Carolina parties have future guidance as to when and how a primary may be canceled. South Carolina courts have granted public-importance standing in far less compelling circumstances than these—in cases asserting, for example, that a preservation society exceeded its authority by conveying property,[4] that a county exceeded its authority by issuing hospital bonds,[5] that a school district violated its procurement regulations by entering into construction contracts without following the prescribed competitive sealed-bidding procedure,[6] and that the state Department of Transportation's expenditure of public funds to inspect private

---

[3] Richard Eckstrom, *A Dumb Thing to Do*, Moultrie News (Sept. 19, 2019); Rouzy Vafaie, *S.C. Republicans Step Away from Democracy by Canceling 2020 Primary*, Charleston City Paper (Sept. 18, 2019); Arthur Ravenel Jr., *Letters to the Editor: GOP Decision to Not Hold Primary Was Wrong*, The Post & Courier (Oct. 3, 2019); Barbara E. Boylston, *Letters to the Editor: Lawsuit Over GOP President Primary Right Call*, The Post & Courier (Oct. 10, 2019); John Webster, Ed Dutton & Greg Sisk, *Opinion: Why Readers Are Angry That SC GOP is Canceling 2020 Presidential Primary*, Greenville News (Sept. 11, 2019); CBS News, *Iowa and New Hampshire Won't Cancel 2020 GOP Primaries* (Sept. 11, 2019) (quoting criticism of the S.C. GOP by Rob Godfrey and Chip Felkel, two veteran South Carolina Republican operatives); Brian Hicks, *If the South Carolina GOP Really Wants Polls to Decide Elections …*, The Post & Courier (Sept. 11, 2019) (reporting that "polls show nearly two-thirds of South Carolina Republicans want their primary, no matter what").
[4] *Evins v. Richland Cty. Historic Pres. Comm'n*, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000).
[5] *Baird*, 333 S.C. at 531, 511 S.E.2d at 75.
[6] *Sloan v. Sch. Dist. of Greenville Cty.*, 342 S.C. 515, 523, 537 S.E.2d 299, 303 (Ct. App. 2000).

bridges violated the state Constitution.[7] None of those cases even approached the public import of this one, where a statewide election was summarily canceled in violation of constitutional, legislative, and state-party directives to the contrary.

II. This case is justiciable and does not present a political question.

Although the subject matter of this case may be politics, that does not mean it's a non-justiciable political question. "The nonjusticiability of a political question is primarily a function of the separation of powers." *Segars-Andrews v. Judicial Merit Selection Comm'n*, 387 S.C. 109, 121, 691 S.E.2d 453, 460 (2010) (internal quotation marks omitted). Thus, "[t]he fundamental characteristic of a nonjusticiable 'political question' is that its adjudication would place a court in conflict with a coequal branch of government." *Id.* at 121–22 (internal quotation marks omitted).

Here, defendants never specify what coequal branch of government they believe this question is properly committed to. On the contrary, they argue strenuously that the S.C. GOP is *not* acting as a government entity when it oversees the primary process. *See* Defs.' Mem. at 14, 18. But defendants can't have it both ways: if, in their view, the conduct of primaries is properly left to the S.C. GOP as "a private entity," then it can't also present a nonjusticiable political question.

In fact, the conduct of primaries is not unreviewably entrusted to any of the political branches. Rather, the South Carolina constitution vests the "legislative power" in the General Assembly. S.C. Const., art. III, § 1. The General Assembly,

[7] *S.C. Pub. Interest Found.*, 421 S.C. at 119, 804 S.E.2d at 859.

in turn, has passed a series of laws to govern political parties generally, elections as a whole, and the primary process, specifically. *See generally* S.C. Code Ann. tit. 7 ("Elections"); *id.*, tit. 7, ch. 9 ("Party Organization"); *id.*, tit. 7, ch. 11 ("Designation and Nomination of Candidates"). Plaintiffs are asking the Court to interpret the language of three provisions of the South Carolina Election Law—sections 7–11–10, 7–11–20, and 7–11–30—as well as the Due Process Clause of the South Carolina Constitution, article I, section 3. That is "emphatically the province and duty of the Judicial Department." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Indeed, "[i]t is the duty of this Court to interpret and declare the meaning of the constitution" and laws. *See Segars-Andrews*, 387 S.C. at 123, 691 S.E.2d at 461 (citing *Abbeville Cty. Sch. Dist. v. State,* 335 S.C. 58, 515 S.E.2d 535 (1999)).

Defendants seem to flip the political question doctrine on its head, and instead argue that this issue is non-justiciable *unless* the S.C. GOP is a state actor. *See* Defs.' Mem. at 17–18. That's wrong. *See Segars-Andrews*, 387 S.C. at 121–23, 691 S.E.2d at 460–61. The case that defendants cite for that proposition, *Wymbs v. Republican State Executive Committee of Florida*, addresses a different issue: when a *federal* court will hesitate to intervene in certain issues, given that a federal court "is one of limited jurisdiction." 719 F.2d 1072, 1076 (11th Cir. 1983). This Court is a court of general jurisdiction, and the South Carolina Supreme Court's decisions—not an inapposite decisions of the Eleventh Circuit—are controlling.

Defendants also urge that this case is nonjusticiable because they raise a First Amendment defense to the merits of plaintiffs' claims. Defs.' Mem. at 15–16.

But that argument is nonsensical. Defendants' arguments on the merits, including their First Amendment arguments, are precisely the type of issue that this Court *must* adjudicate. As the South Carolina Supreme Court has explained, the courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority.'" *Segars-Andrews*, 387 S.C. at 123, 691 S.E.2d at 460 (quoting *Baker,* 369 U.S. at 210–11). That is why South Carolina courts routinely adjudicate the meaning of the Election Laws contained in Title 7. *See, e.g.*, *Gantt v. Selph*, 423 S.C. 333, 814 S.E.2d 523 (2018), *reh'g denied*, (June 27, 2018) (determining that a particular election-related issue was not a political question, and analyzing § 7–5–230); *Tempel v. S.C. State Election Comm'n*, 400 S.C. 374, 381–82, 735 S.E.2d 453, 456–57 (2012) (analyzing § 7–11–55); *Willis v. Wukela*, 379 S.C. 126, 128, 665 S.E.2d 171, 172 (2008) (analyzing § 7–13–350); *see also Jones v. S.C. Republican Party*, 425 S.C. 339, 343–45, 822 S.E.2d 333, 335–36 (2018) (analyzing whether a candidate for sheriff was qualified under § 23–11–110). And that is why courts—both federal and state—routinely consider First Amendment challenges to election laws. *See, e.g.*, *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 203 (2008); *Greenville Cty. Republican Party Exec. Comm. v. South Carolina*, 824 F. Supp. 2d 655, 668 (D.S.C. 2011); *see also infra* p. 30.

This case raises routine questions of statutory interpretation, and despite defendants' arguments, is plainly within the power of this Court to decide. *See Marbury*, 5 U.S. at 177; *Segars-Andrews*, 387 S.C. at 123, 691 S.E.2d at 461.

III. Plaintiffs are entitled to sue under the Declaratory Judgments Act.

Defendants' assertion that sections 7–11–10, –20, and –30 of the South Carolina Code "do not confer a right to sue" upon plaintiffs, Defs.' Mem. at 9–10, adds no strength to their attempt to close the courthouse doors on this lawsuit. Although the statutes do not explicitly confer a right to sue, the South Carolina Supreme Court has entered declaratory and injunctive relief in election cases as a matter of course. For example, in *Beaufort County v. South Carolina State Election Commission*, the Court entered a declaratory judgment (and accompanying injunction) clarifying that section 7–11–20(B)(2) required the state and county election commissions to conduct the S.C. GOP's 2012 primary election. 395 S.C. 366, 377–78, 718 S.E.2d 432, 438–39 (2011). In *Tempel v. South Carolina State Election Commission*, the Court ordered the State Election Commission to hold a special primary under section 7–11–55 after determining that the nominee from the initial Republican Party primary election was disqualified. 400 S.C. at 382, 735 S.E.2d at 457. And in *South Carolina Libertarian Party v. South Carolina State Election Commission*, the Court ruled on the Libertarian Party's petition for declaratory and injunctive relief concerning whether section 7–11–30(A) applied to the party. 407 S.C. 612, 614, 757 S.E.2d 707, 707 (2014); *see also Jones*, 425 S.C. at 344–45, 822 S.E.2d at 335–36 (denying declaratory and injunctive relief on the merits of a challenge under § 23–11–110 to successful sheriff candidate's qualifications). The controversy here calls even more urgently for judicial review.

A "proper vehicle" for bringing such a controversy before the Court is a request for declaratory judgment, as plaintiffs have requested here. *See Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004) (referring to the Declaratory Judgments Act, § 15–53–20, which specifically provides that "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed"). Where a "complaint seeking a Declaratory Judgment sets forth a justiciable controversy it is not subject to demurrer on the ground that it fails to state a cause of action." *Hardwick v. Liberty Mut. Ins. Co.*, 243 S.C. 162, 167, 133 S.E.2d 71, 72 (1963) (internal quotation marks omitted). The "justiciable controversy" standard is met "[w]here a concrete issue is present, and there is a definite assertion of legal rights and a positive legal duty with respect thereto, which are denied by the adverse party." *Dantzler v. Callison*, 227 S.C. 317, 321, 88 S.E.2d 64, 66 (1955) (citing *S.C. Elec. & Gas Co. v. S.C. Pub. Serv. Auth*, 215 S.C. 193, 216, 54 S.E.2d 777, 787 (1949)). In determining whether a complaint meets this standard, the court is not concerned with whether the plaintiff is right on the merits, but only with whether he is entitled to a declaration of rights. *Id.*

Whether to grant declaratory judgment rests in the trial court's sound discretion. *Ott v. Tindal*, 297 S.C. 395, 398, 377 S.E.2d 303, 305 (1989). In exercising its discretion, a court should liberally construe the Declaratory Judgments Act to accomplish its "purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships,

without awaiting a violation of the rights or a disturbance of the relationship." *Sunset Cay, LLC*, 357 S.C. at 423–24, 593 S.E.2d at 466. While "the existence of another remedy and the presence of complicated issues of fact" may be considered, neither is grounds for dismissal. *Guimarin & Doan, Inc. v. Georgetown Textile & Mfg. Co.*, 249 S.C. 561, 567, 155 S.E.2d 618, 621 (1967). Adjudicating declaratory judgment actions is "especially appropriate" where "the meaning of a statute is in question" and "where enabling legislation contains no special review provisions." *Ott*, 297 S.C. at 398, 377 S.E.2d at 305.

These factors favor the Court's exercise of discretion to grant declaratory judgment here. A speedy resolution of this matter is necessary to avoid the irreversible extinguishment of plaintiffs' right to vote in a South Carolina primary at all, let alone in a "First in the South" primary. Defendants' actions have put the meaning of 7–11–10, –20, –30 in question. But the statute contains no special provisions for either a court or a state agency to review the legality of defendants' actions. And the key facts are not in dispute. Declaratory judgment is appropriate.

The Court may also issue preliminary and permanent injunctive relief to enforce a declaratory judgment. The South Carolina Supreme Court has routinely upheld, and occasionally even directed, the issuance of preliminary and permanent injunctive relief in declaratory judgment actions. *See, e.g.*, *Richland Cty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 312, 811 S.E.2d 758, 768–69 (2018); *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 365, 709 S.E.2d 639, 641 (2011); *City of Myrtle Beach v.*

Richardson, 280 S.C. 167, 173–74, 311 S.E.2d 922, 926 (1984); *Redwood Food Corp. v. Baker*, 269 S.C. 528, 530–31, 238 S.E.2d 214, 214–15 (1977).[8, 9]

IV. Defendants violated sections 7–11–10, 7–11–20, and 7–11–30 of the Election Law.

Defendants have violated sections 7–11–10, 7–11–20, and 7–11–30 of the South Carolina Election Law. The Election Law imposes certain democratic safeguards on political parties to ensure that they use a fair and inclusive process to determine who they support in the general election.

The first of these safeguards, section 7–11–10 of the South Carolina Election Law, specifies that a party must choose its preferred candidates for the general election through either a primary or a party convention. S.C. Code Ann. § 7–11–10; *see also Tempel*, 400 S.C. at 379, 735 S.E.2d at 455 (explaining that even a candidate who was certified as the nominee after being unopposed in the primary was still "selected" through a primary, because all candidates must be selected by either a primary or a convention). Here, however, the Executive Committee—using

[8] Where the South Carolina Supreme Court has overturned the issuance of injunctive relief in declaratory judgment actions, it's done so on the merits, not on the grounds that a lower court lacked power to issue injunctive relief. *See, e.g.*, *Foothills Brewing Concern, Inc. v. City of Greenville*, 377 S.C. 355, 360, 660 S.E.2d 264, 267 (2008); *Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 347 S.C. 642, 648–49, 557 S.E.2d 670, 673–74 (2001); *accord. Cullen v. McNeal*, 390 S.C. 470, 481, 702 S.E.2d 378, 384 (Ct. App. 2010).

[9] South Carolina courts' issuance of preliminary and permanent injunctive relief in declaratory judgment actions also comports with federal practice. *See, e.g.*, *Powell v. McCormack*, 395 U.S. 486, 499 (1969) ("A declaratory judgment can . . . be used as a predicate to further relief, including an injunction."); *Horn & Hardart Co. v. Nat'l Rail Passenger Corp.*, 843 F.2d 546, 548 (D.C. Cir. 1988).

neither a primary nor a convention—unilaterally decided that the South Carolina Republican Party will support President Donald Trump to be the Republican candidate for the office of President of the United States. *See* Aff. of Katon E. Dawson ¶¶ 6–7 (noting that the Executive Committee has "decided" to "throw the South Carolina Republican Party's support behind the sitting President . . . for the Republican nomination.").

The second of these safeguards, section 7–11–30, requires that *if* a party wishes to change from using a primary to using a convention to select whom it will support in the general election, it must observe certain procedures to ensure that the party's members—and not just a politburo of party bosses—support canceling the primary. Specifically, section 7–11–30 requires a party's voters to ratify any switch from a primary to a convention by *both* "a three-fourths vote of the total membership of the convention" *and* a vote by "a majority of voters in that party's next primary election [to] approve the use of the convention nomination process." S.C. Code Ann. § 7–11–30(A)(1), (A)(2).

Here, by the plain terms of section 7–11–30, the S.C. GOP *already* has chosen not to switch from its usual practice—holding a presidential primary—to holding a convention, because a majority of members in its last convention did not "approve the use of the convention nomination process," nor did "three-fourths" of voters at its last primary. Thus, because a party must select the candidate it supports for the general election through either a primary or a state convention, and the S.C. GOP

forewent its chance to switch to a state convention during this cycle, it is *obligated* to hold a presidential primary.

The third safeguard, contained in section 7–11–20, requires that a political party follow its own rules, to the extent that those rules don't conflict with the law. S.C. Code Ann. § 7–11–20. Section 7–11–20(B) further explains that there is no exception to that rule for presidential preference primaries; rather, "the State Election Commission must conduct the presidential preference primary in accordance with the provisions of this title *and party rules*." *Id.* § 7–11–20(B)(2) (emphasis added). Here, the S.C. GOP's rules are crystal clear: "Unless decided otherwise by the state party convention within two (2) years prior to each presidential election year, the South Carolina Republican Party shall conduct a statewide presidential preference primary on a date selected by the chairman of the party." S.C. GOP Rule 11(b)(1). The South Carolina Republican Party has not properly "decided otherwise," that is, against holding a primary—because to do so, it would have had to follow the procedure in section 7–11–30, which it failed to do. Thus, the S.C. GOP is obligated *by its own rules*, in addition to the law, to hold a presidential preference primary.

A. Sections 7–11–10 and 7–11–30 apply to presidential preference primaries.

Defendants argue that they are not constrained by sections 7–11–10 and 7–11–30 because those provisions do not apply to presidential preference primaries. *See* Defs.' Mem. at 20–24. They are wrong.

First and foremost, a "[c]ourt should give words 'their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" *State v. Sweat,* 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (quoting *Sloan v. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006)). Here, the plain meaning of the text is unambiguous: "A party may choose to change from nomination of candidates by primary to a method to nominate candidates by convention for *all* offices including, *but not limited to*, Governor, United States Senator, United States House of Representatives, Circuit Solicitor, State Senator, and members of the State House of Representatives . . . ." S.C. Code Ann. § 7–11–30 (emphases added). "All" has a plain and unambiguous meaning: all. Moreover, the phrase "including, but not limited to," likewise has a straightforward meaning: that the list provided is a set of examples, not an exhaustive list. *See* Antonin Scalia & Bryan J. Garner, *Reading Law: The Interpretation of Legal Texts* 132–33 (2012) (explaining that "*include* does not ordinarily introduce an exhaustive list," and the phrase "*including but not limited to*" is intended to "defeat the negative-implication canon").

This textual analysis of section 7–11–30 alone is enough. But when read in context with the rest of the Election Law, it becomes clear that defendants' theory is not supported by the structure and context of the Election Law as a whole. *See* Defs.' Mem. at 23. The Election Law as a whole (Title 7 of the South Carolina Code) provides a comprehensive scheme to govern the many aspects of elections, including political parties, qualifications of candidates, elections themselves, and primaries.

Quite reasonably, Title 7 treats primaries as a whole in a consistent manner; and on the relatively rare occasions when it needs to carve out presidential preference primaries and treat them differently, it does so quite explicitly. *See, e.g.*, S.C. Code § 7–11–20(A), (B)(2) (distinguishing presidential preference primaries from other primaries, in both the text, and title of the section). Thus, when Title 7 does *not* draw that distinction, the Court should not read it in. *See Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) ("When the language of a statute is clear and explicit, a court cannot rewrite the statute[.]"); *Whitfield v. United States*, 543 U.S. 209, 216–17 (2005) ("Congress has included an express overt-act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so. Where Congress has chosen *not* to do so, we will not override that choice[.]" (citation omitted)). In other words, the fact that the General Assembly knows how to separate out presidential preference primaries when it needs to supports *plaintiffs'* interpretation of the statutory scheme, not defendants'.

Specific sections of the statute reinforce this interpretation. For example, section 7–13–15 requires most primaries, but not presidential ones, to be conducted on the second Tuesday in June. It states:

> (B) Except as provided in subsection (A) or unless otherwise specifically provided for by statute or ordinance, the following primaries must be conducted by the State Election Commission and the county boards of voter registration and elections on the second Tuesday in June of each general election year:

> (1) primaries for federal offices, *excluding a presidential preference primary for the Office of President of the United States as provided pursuant to Section 7-11-20(B)*; and
>
> (2) primaries for [several specified state offices].

S.C. Code Ann. § 7–13–15(B) (emphasis added).

The same section defines "federal offices" to *include* the office of President—which is why the statute needs to *explicitly exclude* the presidential primary when it comes to scheduling primaries for the second Tuesday in June. (The reason, of course, for exempting presidential primaries from the second Tuesday in June requirement is to maintain South Carolina's status as the "First in the South" to allow its voters to weigh in on the presidential contest—a status that the S.C. GOP's unlawful actions threaten to destroy for Republican voters such as plaintiffs.) In short, it is clear that the Election Law's reference to "offices" *includes* the office of the President, unless otherwise specified because the word offices—like any other word in a statute—should be "presumed to bear the same meaning throughout a text." Scalia & Garner, *supra*, at 170. Thus, the procedural requirements in section 7–11–30, which govern how a "party may choose to change from nomination of candidates by primary to a method to nominate candidates by convention for *all offices*," speaks to contests for the office of the President no less than to any other office.

Further, all of the interpretive tools discussed in plaintiffs' memorandum in support of its motion for injunctive relief lend further support to the conclusion that

section 7–11–30 refers to *all* primaries, including presidential primaries. *See* Pls.' Mem. at 16–20.

B. Defendants' conduct violates either 7–11–20(B)(2) or 7–11–20(A).

Defendants argue that because 7–11–20(B)(2) allows parties to "decide" whether to have a presidential preference primary, they can simply opt out of using a primary or a state convention to select who they support for president—and instead, not follow party rules and use neither. Defs.' Mem. at 22–23.

Not so. The purported basis for this argument is found in § 7–11–20(B)(2), which states, in relevant part: "If the state committee of a certified political party . . . *decides* to hold a presidential preference primary election, the State Election Commission must conduct the presidential preference primary in accordance with the provisions of this title and party rules." (Emphasis added). Defendants ask this Court to wrench this provision out of the context of the rest of the Election Law, as if the single word "decides" gave a party's state committee free rein to opt out of the entire legal framework laid out by the General Assembly. But the South Carolina Supreme Court has made clear that courts must read statutory terms in context, interpreting the statute "as a whole." *Browning v. Hartvigsen,* 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992); *Hill v. York Cty. Natural Gas Auth.*, 384 S.C. 483, 682 S.E.2d 809, 811–12 (2009) ("[W]ords in a statute must be construed in context." (quoting *S. Mut. Church Ins. Co. v. S.C. Windstorm and Hail Underwriting Ass'n*, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991)); *see also* Scalia & Garner, *supra*, at 167 ("Context is the primary determinant of meaning.").

Reading this text in context, the meaning is clear. Section 7–11–10 lays out two options—a primary or a convention—and lets the party decide which to follow. Crucially, however, the party must make that decision in accordance with the law. Section 7–11–30 lays out the procedural steps that a party must follow if it decides to switch from the primary option to the convention option. And here, because defendants have not followed those steps—that is, because a majority of Republican voters in the last primary and a supermajority of party members at the state convention did not choose to use a state convention to select their candidate—defendants have *already* "decide[d]" to hold a presidential preference primary under 7–11–20(B)(2). What has locked defendants into their choice to use a primary is their own decision to refrain from obtaining Republican party voters' support for opting out of a primary and into using a state convention to select their preferred candidate. If defendants wanted to opt out of holding a presidential preference primary, they had the opportunity to do so—provided it was a choice by the party voters, in accordance with section 7–11–30.

The General Assembly's preference for primaries is no accident. As the Chairman of the State Election Commission explained in a 2014 court filing discussing the 2013 amendments—amendments that were passed after the last time a major political party canceled a presidential primary[10]—to section 7–11–30:

[10]The General Assembly amended section 7–11–30 in 2013 to *strengthen* a party's obligation to obtain the approval of the voters—and not just party leaders—before switching from a primary to a convention. *See* Equal Access To The Ballot Act, Act. No. 61 (2013). Previously, a party was required to obtain the approval of three-fourths of the convention membership. *See* S.C. Code Ann. § 7–11–30 (2012). After

> South Carolina, through its General Assembly, has historically recognized, and does today, a preference for the party primary. The State's decision to impose a three-fourths vote requirement to use a convention to nominate in lieu of a primary simply demonstrates the State's desire to be assured that such decision is done with serious reflection and with a consensus of party members attending the convention.

Resp. Br. of Appellees at 40–41, *Greenville Cty. Republican Party Exec. Comm. v. Way*, No. 13-2170 (4th Cir. Mar. 31, 2014), ECF No. 30-1. Thus, far from undermining plaintiffs' argument, the General Assembly's use of the word "decides" in section 7–11–20(B) strengthens it. The party's obligation to "decide" whether to use a primary or a state convention to select its preferred candidate is an important one that must be undertaken in accordance with the law—and the law establishes a preference for a primary. Defendants *already* have decided to use a presidential preference primary—by failing to follow section 7–11–30's procedures for opting out of having one.

In the alternative, even if this Court determines that defendants' actions are not governed by 7–11–20(B)(2), that doesn't mean that defendants are free of any legal requirements when picking which presidential candidate to support. Section 7–11–20(B)(2) is, by its very terms, an *exception* to subsection 7–11–20(A) that requires the State Election Commission to pay for a presidential preference primary by a major political party. So if subsection 7–11–20(B)(2) doesn't apply, the right

---

2013, the party is required to obtain approval of *both* three-fourths of the convention membership *and* a majority of primary voters. Defendants argue that because the South Carolina Republican Party has canceled primaries in the past (in 2004 and 1984), it can cancel this primary. Defs.' Mem. at 26. But even if past practice were determinative of current law (which it isn't), their argument isn't applicable—the law *changed* in a relevant way in 2013, and canceled primaries before that are inapposite.

conclusion isn't anything goes: it's that defendants' activities are governed by subsection 7–11–20(A) ("Except as provided in subsection (B) . . . "). And subsection 7–11–20(A) requires the defendants to conduct conventions for "any . . . office"—which, as explained above, includes the office of President of the United States—"in accordance with the provisions of this title and with party rules." As a result, if subsection 7–11–20(B)(2) does not govern, then subsection 7–11–20(A) *does* apply—and thus the ultimate conclusion that defendants are legally bound by section 7–11–20 to follow their own rules remains correct. As explained above, defendants have undoubtedly violated their own rules by canceling the primary.[11]

* * *

Defendants have violated sections 7–11–10, 7–11–20, and 7–11–30 of the South Carolina Election Law. The law requires the S.C. GOP to use *either* a primary *or* a state convention to determine who it supports as for President. *See* S.C. Code Ann. §§ 7–11–10, 7–11–30. Instead, the party has chosen to use *neither*. Moreover, the South Carolina Election Law requires the S.C. GOP to follow its *own* rules. *Id.* § 7–11–20. Those rules require the party to "conduct a statewide presidential preference primary" unless "decided otherwise by the state party convention within two (2) years prior to each presidential election year." S.C. GOP Rule 11(b)(1). The party never placed this choice before a state convention. The

[11] Defendants suggest that Rule 2(a), which provides that "[t]he spirit and not the letter of each Rule shall be controlling," and that "[s]ubstantial compliance with a Rule shall be sufficient," permits them to cancel the primary. Defs.' Mem. at 26. But contravening the letter and intent of Rule 11(b)(1) neither vindicates its spirit nor constitutes "substantial compliance."

S.C. GOP has therefore broken its own rules, as well as the law, and has deprived Republican voters of their voice in the primary process.

V. Defendants violated the Due Process Clause of the South Carolina Constitution.

Although the Court need not reach the issue, given that section 7–11–20 alone compels the S.C. GOP to follow its rules, the party's failure to follow its rules also violates South Carolina's Due Process Clause.

The Due Process Clause provides that no person "shall . . . be deprived of life, liberty, or property without due process of law." S.C. Const. art. I, § 3. It prohibits state action that "arbitrarily and capriciously" deprives individuals of protected liberty interests, *e.g.*, *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 300, 737 S.E.2d 601, 611 (2013); *see also Worsley Cos., Inc. v. Town of Mount Pleasant*, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000); and a government body's failure to "follow its own regulations" is a quintessential type of arbitrary and capricious conduct prohibited by the Due Process Clause, *see Triska v. Dep't of Health & Envtl. Control*, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987); *Wilkinson v. Legal Servs. Corp.*, 27 F. Supp. 2d 32, 48 (D.D.C. 1998) ("The requirement that agencies are bound by their own rules reflects the broader principle, found in the Due Process Clause, that government officials are bound by the rule of law.").[12]

[12] South Carolina follows federal precedent in determining the scope of the protections afforded by the South Carolina Constitution's Due Process Clause. *See, e.g.*, *Rivers v. State*, 327 S.C. 271, 276–79, 490 S.E.2d 261, 263–65 (1997); *S.C. Nat'l Bank v. Cent. Carolina Livestock Mkt., Inc.*, 289 S.C. 309, 313, 345 S.E.2d 485, 488 (1986); *see also S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n*,

Defendants don't dispute these tenets of Due Process doctrine. They argue only that the S.C. GOP is not bound by those tenets because the right to vote in a primary is not a protected liberty interest and because their decision did not constitute state action. Defs.' Mem. at 24–25. They're wrong on both counts.

The Supreme Court has long held that the right to vote is a liberty interest protected by the Due Process Clause. *See United States v. Texas*, 252 F. Supp. at 250; *Anderson*, 460 U.S. at 787. And it is beyond debate that the right to vote includes the right to vote in primary elections. *See supra* at p. 6.

The S.C. GOP's decision to cancel its primary also constitutes state action. In *Gray v. Sanders*, the Supreme Court held that a party's actions become state action where a state "puts its power behind the rules of the party." 372 U.S. at 374. More recently, in *New York State Board of Elections v. Lopez Torres*, the Supreme Court explained that where a state gives certain parties the right to have their candidates appear with party endorsement on the general-election ballot, the actions of the party become state action. 552 U.S. at 203. Here, South Carolina has both put its power behind the S.C. GOP Rules and given the party the right to have its candidates appear on the ballot beside the party's name, regardless of how it chooses those candidates. S.C. Code Ann. §§ 7–11–20; 7–13–320(C).[13] Its nomination of candidates is therefore state action.

---

389 S.C. 380, 391, 699 S.E.2d 146, 152 (2010) (holding that Due Process clauses of the state and federal constitution are equivalent to each other, as well as to Article I, § 22 of the state constitution).

[13] The involvement does not end there. Section 7–11–10 of South Carolina's Election Law limits the candidates for a general election to those nominated "by

Defendants concede that when the S.C. GOP holds a primary election, it is a state actor subject to constitutional limitations. Defs.' Mem. at 11 n.1., 24–25. But they're wrong to suggest that the decision to hold a primary is what converts the a party's actions into state action. *Id.* at 24–25. Instead, it is a state's decision to give a party a "special role" in the election process that converts the party's action to state action. *See Lopez Torres*, 552 U.S. at 203. So where, as here, a state "giv[es] certain parties the right to have their candidates appear with party endorsement on the general-election ballot," those parties' nominating processes are state action. *Id.*; *see also Cal. Democratic Party v. Jones*, 530 U.S. 567, 573 (2000); *Rice v. Elmore*, 165 F.2d 387, 391 (4th Cir. 1947).

Nor do Defendants cite any case holding that political parties must only abide by constitutional restraints on racial discrimination when they nominate candidates. *Cf.* Defs.' Mem. at 6, 18 & n.3.[14] "When [party] officials participate in

---

political party primary, by political party convention, or by petition." Section 7–11–20, in turn, provides that only "certified political part[ies]" may nominate candidates by primary or convention.

[14] The one case defendants point to–a 1983 decision from the Eleventh Circuit–for the proposition that Courts have "hesitated to find state action when . . . racial discrimination is not involved" simply mischaracterizes decisions in which courts found it unnecessary to reach the issue. *Compare Wymbs*, 719 F.2d at 1077; *with Cousins v. Wigoda*, 419 U.S. 477, 483 n.4 (1975) (explicitly "intimat[ing] no views upon the merits" of the state action question); *O'Brien v. Brown*, 409 U.S. 1, 2, 5 (1972) (entertaining "grave doubts", not about party action constituting state action in general, but about the D.C. Circuit's decision to weigh in on the Democratic Party Credential Committee's "recommendation" to unseat delegates); *and Ripon Soc'y, Inc. v. Nat'l Republican Party*, 525 F.2d 567, 576 (D.C. Cir. 1975) (declining to reach the issue). Indeed, the Eleventh Circuit itself declined to reach the question. *Wymbs*, 719 F.2d at 1086.

what is a part of the state's election machinery, they are election officers of the state de facto if not de jure, and as such must observe the limitations of the Constitution." *Rice*, 165 F.2d at 391. Parties don't get to pick and choose which provisions of the constitution to comply with when they nominate candidates for a general election.[15]

VI. Neither the statutes at issue nor the relief requested violate the First Amendment.

Defendants suggest that it is unconstitutional to require a party to observe basic democratic safeguards before switching from a primary to a convention to select its preferred candidate for the general election. That claim gets First Amendment law precisely backwards.

---

[15] The State Executive Committee's decision to cancel the S.C. GOP's primary was also *ultra vires* and void under principles of South Carolina corporate law. In general, corporations may exercise only those powers granted to them by law, their charters, and any bylaws made pursuant thereto. *Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 415 S.C. 256, 271, 781 S.E.2d 903, 911 (2016). Any action a corporation takes outside the scope of those powers is *ultra vires* and void. *See, e.g.*, *id.* at 271, 781 S.E.2d at 911; *Trost v. Sea Mark Tower Prop. Owners Ass'n, Inc.*, No. 2004–UP–284, 2004 WL 6310042, at *1, 3–4 (S.C. Ct. App. Apr. 29, 2004).

The S.C. GOP and its State Executive Committee are akin to corporations. Like corporations, the certified party and its State Executive Committee are creatures of state law. *See* S.C. Code Ann. § 7–9–10 (establishing certified parties); *id.* § 7–9–90 (establishing state executive committees). Just as a corporation's Board is bound by the corporations' bylaws, the State Executive Committee is bound by the S.C. GOP Rules. No rule allows the Committee to violate the Rules—instead, Rule 2(h) specifically prohibits the Committee from altering the Rules itself. When the State Executive Committee violated those rules, it therefore acted *ultra vires* and, just with the *ultra vires* act of a Board of Directors for a corporation, the Committee's *ultra vires* act should be voided.

As the United States Supreme Court has explained, "We have considered it *too plain for argument* . . . that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion." *Cal. Democratic Party*, 530 U.S. at 572 (Scalia, J.) (internal quotation marks omitted) (emphasis added); *see also Lopez Torres*, 552 U.S. at 205 (Scalia, J.) ("[W]e have . . . permitted States to set their faces against 'party bosses' by requiring party-candidate selection through processes more favorable to insurgents, such as primaries").[16] That interpretation of the First Amendment binds this Court. *See James v. City of Boise, Idaho*, 136 S. Ct. 685, 686 (2016) ("[A]ny . . . state . . . court . . . is bound by this Court's interpretation of federal law.").

Defendants' First Amendment–based defense therefore fails at the outset. Given that South Carolina could have constitutionally mandated that the S.C. GOP hold a primary, *a fortiori* it may impose the lesser requirement that the party follow its own rules and get the support of primary voters before switching from a primary to a convention. *See Greenville Cty. Republican Party Exec. Comm.*, 824 F. Supp. 2d

[16] *See also Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 237 (1986) (Scalia, J., dissenting) ("[T]here is no reason why the State is bound to honor . . . a party's democratically expressed desire that its candidates henceforth be selected by convention rather than by primary, or by the party's executive committee in a smoke-filled room."); *Lightfoot v. Eu*, 964 F.2d 865, 872–73 (9th Cir. 1992) (noting "no government interest" was "more compelling" than ensuring that party system did not interfere with "cleaner, more efficient government," and that therefore "the State's interest in enhancing the democratic character of the election process overrides whatever interest the Party has in designing its own rules for nominating candidates.").

at 668 ("The convention nomination statute does not have any direct [e]ffect on political parties' internal processes. It only indirectly impacts parties by placing requirements on the parties' efforts to utilize the convention method as an alternative to an open primary.").[17]

Defendants cite *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), and *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), apparently for the remarkable proposition that any state regulation of presidential party primaries is unconstitutional. Defs.' Mem. at 25. But neither decision went nearly that far, for obvious reasons. After all, were it otherwise, a state could not pass a statute prohibiting a segregated presidential primary or convention—a result that cannot possibly be correct. *Cf. Terry v. Adams*, 345 U.S. 461 (1953) (holding that a whites only pre-primary election is unlawful).

Far from holding that state parties may select their preferred presidential candidates according to whatever procedures they wish, *Tashjian* and *La Follette* hold that the First Amendment limits the ability of states to override party rules concerning who may participate in party conventions and primaries. *Tashjian* invalidated a Connecticut statute that barred independent voters from participating in party primaries, notwithstanding party rules welcoming such voters. *See* 479 U.S. at 210–11. And *La Follette* held that the First Amendment prevents a state

[17] On appeal, the Fourth Circuit denied a request to vacate this ruling because the appellant lacked standing to appeal. *See Greenville Cty. Republican Party Exec. Comm. v. Greenville Cty. Election Comm'n*, 604 F. App'x 244, 253 (4th Cir. 2015).

from compelling a national party convention to seat a delegation in violation of the party's own rules. *See* 450 U.S. at 121–22. Those cases are thus doubly inapplicable here. First, plaintiffs do not seek to compel the S.C. GOP to exclude any voters, as in *Tashjian*, or to accept any particular national delegates, as in *La Follette*. Second, and crucially, unlike the states in *Tashjian* and *La Follette*, plaintiffs aren't asking this Court to order the S.C. GOP to break any party rules. On the contrary, they demand only that the state party *follow* its own rules—an obligation backed by state law. The freedom of expressive association can't be twisted into a right of an organization to flout its own binding rules.[18]

That is particularly true in a case like this one, where the state law at issue establishes neutral procedural requirements to ensure that the electoral process is fair, transparent, and not controlled by the whims of party bosses. The U.S. Supreme Court has repeatedly observed that "government must play an active role in structuring elections . . . if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (internal quotation mark omitted). For that reason, the Court has held that First Amendment claims in the electoral context are governed by a balancing test, under which courts weigh "the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to

[18] Defendants also cite *Ripon Soc'y, Inc.*, 525 F.2d 567, *see* Defs.' Mem. at 25, in which the D.C. Circuit rejected an attempt to apply the "one-person, one-vote" principle to a national party convention, *see id.* at 587–88. But that case is totally inapposite here, where plaintiffs merely seek to enforce the S.C. GOP's obligation to follow state law and its own rules.

vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Id*. at 434 (quoting *Anderson*, 460 U.S. at 789 (internal quotation marks omitted)). It is that balancing test that governs the First Amendment issues here, not an annotation last updated in 1947, *see* Defs.' Mem. at 26 (quoting *Determination of Controversies Within Political Party*, 169 A.L.R. 1281 § III (1947)).

As explained above, South Carolina's "compelling" interest in ensuring that intraparty competition is resolved in a fair manner "overrides whatever interest the Party has in designing its own rules for nominating candidates." *Lightfoot*, 964 F.2d at 873; *see also*, *e.g.*, *Alaskan Indep. Party v. Alaska*, 545 F.3d 1173, 1180 (9th Cir. 2008) (holding that a "state's interest in eliminating the fraud and corruption that frequently accompanied party-run nominating conventions is compelling, and that a democratic primary is narrowly tailored to advance these state interests."). Thus, we end up back where we started: the provisions of the Election Law that prevent primaries from being unilaterally cancelled by party bosses are constitutional because the state's compelling goals of fairness and transparency outweigh any supposed First Amendment interests the S.C. GOP may have in violating its own rules. *See Cal. Democratic Party*, 530 U.S. at 572; *Lopez Torres*, 552 U.S. at 205; *Greenville Cty. Republican Party Exec. Comm.*, 824 F. Supp. 2d at 668.

VII. The remaining equitable factors support granting a preliminary injunction.

In addition to demonstrating a likelihood of success on the merits, plaintiffs have satisfied the remaining factors supporting a preliminary injunction. Defendants concede that plaintiffs have no adequate remedy at law. Defs.' Mem. at 28–29. All that remains is whether plaintiffs will be irreparably harmed, *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010), and whether a bond is necessary to secure defendants' interests during the pendency of a preliminary injunction, S.C. R. Civ. P. 65(c).

But first, a point of clarification: plaintiffs do not seek a "mandatory" preliminary injunction, requiring heightened scrutiny. *Cf.* Defs.' Mem. at 18–20. Instead, plaintiffs seek a prohibitory injunction aimed at "maintain[ing] the status quo and prevent[ing] irreparable harm while a lawsuit remains pending." *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013) (quoting *Sun Microsystems, Inc. v. Microsoft Corp.*, 333 F.3d 517, 524 (4th Cir. 2003)). The "last uncontested status between the parties which preceded the controversy," *id.* (quoting *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 378 (4th Cir. 2012)), was not that the S.C. GOP retained "discretion on whether to decide to hold a presidential preference primary," Defs.' Mem. at 19. The last uncontested status was that the S.C. GOP would conduct its "First in the South" presidential primary election in accordance with S.C. GOP Rule

11(b)(1) and state law. This contest precipitated from defendants' decision to alter the status quo by unlawfully cancelling the primary.[19]

A. Plaintiffs have established irreparable harm.

Plaintiffs will undoubtedly suffer irreparable harm absent an injunction from this Court. The denial of the opportunity to vote constitutes the archetype of an irreparable injury that cannot be repaired with a later award of monetary damages. *See, e.g.*, *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("Courts routinely deem restrictions on fundamental voting rights irreparable injury."); *Am. Civil Liberties Union of Ky. v. McCreary Cty., Ky.,* 354 F.3d 438, 445 (6th Cir. 2003) ("[I]f it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated."), *aff'd sub nom. McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005). Unlike challenges concerning the way in which an election will be conducted, there will be no opportunity for plaintiffs to raise their challenge after they are disenfranchised. *Cf. Denman v. City of Columbia*, 387 S.C. 131, 141, 691 S.E.2d 465, 470 (2010) (finding that plaintiff would not suffer irreparable harm because, among many other reasons, he could contest the election afterward).

[19] Defendants' reliance on *De La Fuente v. S.C. Democratic Party*, 164 F. Supp. 3d 794 (D.S.C. 2016), is misplaced. There, a candidate sought a preliminary injunction requiring the Democratic Party to place him on a ballot he was never on to begin with. *Id.* at 796–97. The Court characterized the requested relief as a "mandatory" preliminary injunction because the candidate sought "to *alter* the status quo." *Id.* at 798. Here, in contrast, plaintiffs seek only to return to the state of things prior to the S.C. GOP State Executive Committee's decision to cancel its primary.

Defendants simply mischaracterize plaintiffs' claims in arguing otherwise. Plaintiffs do not contend that they have some absolute right to vote in an early primary; all plaintiffs claim is a right to vote in the S.C. GOP's "First in the South" primary, unless and until it is canceled in compliance with party rules and the law. *See supra* at pp. 22–26. Unless defendants lawfully cancel the primary, plaintiffs will be irreparably harmed by being prevented from exercising their right to vote in that election.

B. No bond should be required.

This Court should deny defendants' request for a bond for three reasons.

First, defendants have not identified, let alone established, any "costs and damages" they might incur during the course of an injunction for which a bond would be necessary. As plaintiffs' brief in support of their motion for a preliminary injunction explained, the only potential expense that an injunction would create is the cost of holding an election, and that cost would be borne by the State Election Commission, not defendants. *See* Pls.' Mem. at 24–25. Defendants do not contest this point. Nor do they identify any other cost or damage that they would incur as a result of an injunction.

While defendants quibble with the notion of a "nominal bond," the case they cite holds only that a bond that would not provide the enjoined party with sufficient security is inadequate. *See* Defs.' Mem. at 29–30; *Atwood Agency v. Black*, 374 S.C. 68, 73, 646 S.E.2d 882, 884 (2007). Where, as here, defendants identify no costs they will incur, a nominal bond would more than suffice. As the Fourth Circuit has

explained: "Where the district court determines that the risk of harm is remote, or that the circumstances otherwise warrant it, the court may fix the amount of the bond accordingly. In some circumstances, a nominal bond may suffice." *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 n.3 (4th Cir. 1999).[20] Indeed, the court there cited approvingly a Second Circuit decision explaining that "the district court may dispense with security where there has been no proof of likelihood of harm to the party enjoined." *Int'l Controls Corp. v. Vesco*, 490 F.2d 1334, 1356 (2d Cir. 1974).

Second, defendants cannot rebut plaintiffs' explanation, in their opening brief, that this Court maintains discretion as to whether to require a bond at all. The two cases defendants cite do not construe Rule 65(c), but instead construe much older and distinct statutes. *See Headdon v. State Hwy. Dep't*, 14 S.E.2d 586, 588 (S.C. 1941); *Hunt v. Smith*, 18 S.C. Eq. 277, 280 (1 Rich. Eq.) (1845). Those cases can hardly be said to supersede the extensive and persuasive federal precedent plaintiffs have cited demonstrating that courts exercise discretion in cases vindicating important constitutional rights.

Third, defendants are wrong to suggest that an injunction bond should or could cover their attorneys' fees. South Carolina follows the "American Rule," under which "attorneys' fees and costs are not recoverable unless authorized by contract or statute." *Maybank v. BB&T Corp.*, 416 S.C. 541, 580, 787 S.E.2d 498,

[20] The Note to South Carolina Rule of Civil Procedure 65(c) specifies that it is "substantially" the Federal Rule of Civil Procedure 65(c).

518 (2016); *S.C. Dep't of Transp. v. Revels*, 411 S.C. 1, 9, 766 S.E.2d 700, 704 (2014) ("Under the 'American Rule,' the parties to a lawsuit generally bear the responsibility of paying their own attorneys' fees."). "Consistent with this general rule against fee-shifting, it has long been established that a prevailing party may not generally collect as damages against an injunction bond attorneys' fees expended in litigating the injunction." *Nokia Corp. v. InterDigital, Inc.*, 645 F.3d 553, 560 (2d Cir. 2011); *see Tullock v. Mulvane*, 184 U.S. 497, 509–14 (1902); *Fireman's Fund Ins. Co. v. S.E.K. Constr. Co.*, 436 F.2d 1345, 1352 (10th Cir.1971) ("Under [Rule 65(c)] attorneys' fees . . . are not recoverable.").

Finally, defendants are wrong to suggest that plaintiffs' counsel should pay the bond. The vindication of South Carolinians' voting rights should not be predicated on a $100,000 ransom. Such a bond would chill any future attempts of South Carolina citizens to challenge violations of the election law.

CONCLUSION

For the reasons stated above, the Court should deny the motion to dismiss and grant a preliminary injunction ordering the Executive Committee of the South Carolina Republican Party to: (1) inform the State Election Commission that it will hold a presidential preference primary election in February 2020; and (2) withdraw its delegate allocation plan submitted to the Republican National Convention on October 1, 2019, and to resubmit a delegate allocation plan following the final resolution of this action that is consistent with the orders of this Court.

Dated: October 18, 2019

Respectfully submitted,

By: /s/ Bess DuRant

Thornwell F. Sowell III, SC Bar No. 5197
Bess DuRant, SC Bar No. 77920
SOWELL & DURANT LLC
1325 Park St., Suite 100
Columbia, SC 29201
Telephone: (803) 722-1100
Facsimile: (803) 281-8890
bsowell@sowelldurant.com
bdurant@sowelldurant.com

Cameron Kistler (*pro hac vice*)[21]
Rachel F. Homer (*pro hac vice*)
UNITED TO PROTECT DEMOCRACY, INC.
2020 Pennsylvania Avenue, NW, #163
Washington, D.C. 20006
Telephone: (202) 579-4582
Facsimile: (929) 777-8428
cameron.kistler@protectdemocracy.org
rachel.homer@protectdemocracy.org

John Langford (*pro hac vice*)
UNITED TO PROTECT DEMOCRACY, INC.
555 W. 5th St.
Los Angeles, CA 90013
Telephone: (202) 579-4582
Facsimile: (929) 777-8428
Email: john.langford@protectdemocracy.org

Deana K. El-Mallawany (*pro hac vice*)
UNITED TO PROTECT DEMOCRACY, INC.
15 Main Street, Suite 312
Watertown, MA 02472
Telephone: (202) 579-4582
Facsimile: (929) 777-8428

[21] Plaintiffs' initial complaint contained a clerical error in its signature block. In subsequent filings, the signature block has been corrected from "The Protect Democracy Project, Inc." to "United to Protect Democracy, Inc."

deana.elmallawany@protectdemocracy.org

Counsel for plaintiffs